



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST OF OTHER JUDGES: NO
(3) REVISED

27/10/21
DATE


SIGNITURE

CASE NUMBER: 7164/2021

In the matter of

CHANTELLE VAN ROOYEN

FIRST APPLICANT

IVAN VAN ROOYEN

SECOND APPLICANT

ANELE SAMANTHA OMEZI

FIRST RESPONDENT

HONESTY UBAKA OMEZI

SECOND RESPONDENT

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

THIRD RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This case concerns a costs order whereby by the time the matter was heard the respondents vacated the property. The respondents seek a costs order on the attorney and client scale against the applicant.

[2] This is an application where Chantelle and Ivan van Rooyen (“the applicants”) seeks the ejectment of Anele Samantha and Honesty Ubaka Omezi (“the respondents”) from the leased property namely, Unit 19 Flora View, 69 Olympus street, Florida North, Roodepoort, Gauteng Province (“the property”).

[3] The applicant did not seek an money judgement, reason being that the respondents for the period January 2021 until September 2021 paid the monthly rental into the account of the agent. The agent in turn informed the respondent that the payment and acceptance of the monthly rental does not imply that the lease agreement was renewed.

[4] At the outset the applicant’s counsel explained that the respondents vacated the property on 30 September 2021 and as a result, the applicant would no longer be persisting with the relief sought in respect of the ejectment of the respondents.

[5] The issue before me, therefore, is concerned with the cost order.

[6] The respondents argued for a cost order to be granted in favour of them by virtue of the fact that the respondents vacated the property within the period as agreed upon by the respondents and the rental agent, Donald McLachlan (“Donald”).

[7] The facts of the application shall be briefly summarised hereunder as to why the respondents prayed for costs to be paid by the applicant on attorney and client scale. It is argued by the respondents that the application for ejectment was without merit and as such deserving of a punitive cost order.

[8] The applicants opposed the request and prayed for a cost order against the respondents on attorney and client as stipulated in the lease agreement concluded on 6 January 2020.¹

Background of relevant facts

[9] On 6 January 2020 the applicants appointed rental agent, Solo Properties (“the agent”) who concluded a fixed term lease agreement with the first and second respondent on behalf of the applicants in respect of the property. The material terms of the lease agreement were the following;

1. The lease agreement shall subsist for a fixed term period of twelve (12) months, commencing on 11 January 2020 and terminating on 31 December 2020.
2. The respondents shall be liable for the payment of rental in the amount of R 11 950.00 per month.
3. The monthly rental shall be subject to an annual escalation of 10% per annum.
4. The respondents will be contacted not more than 80 (eighty) days, but not less than 40 (forty) days, before the end date of the lease agreement, in respect of renewing of the lease agreement. Any renewal will be negotiated between and agreed to by the applicants/agents and the respondents, which terms shall be reduced to writing.²
5. Should the applicants have to take any legal action against the respondents the respondents shall pay costs on an attorney and client scale.

[10] The respondents took occupation of the property in accordance with the lease agreement.

[11] During June 2020 the applicants indicated their intention to sell the property. On 16 October 2020 the applicants confirmed to the agent that they will not be renewing the lease agreement with the respondents for a further period beyond the expiration of the fixed term lease period.

¹ Clause 35 of the lease agreement.

² Clause 25 of the lease agreement.

[12] On 21 October 2020 the agent caused a letter to be delivered to the respondent via email wherein the respondents were advised that the lease agreement would not be renewed beyond the expiration of the fixed term period. The letter was sent to the respondents in terms of the lease agreement as referred to in clause 25 of the lease agreement. The termination of the lease agreement also complied with section 14(2) of the Consumer Act, Act 68 of 2008³. The respondents were informed that they should vacate the property on 31 December 2020.

³ (2) If a consumer agreement is for a fixed term —

(a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;

(b) despite any provision of the consumer agreement to the contrary —

(i) the consumer may cancel that agreement —

(aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or

(bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or

(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;

(c) of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of —

(i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and

(ii) the options available to the consumer in terms of paragraph (d); and

(d) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph

(c), unless the consumer expressly —

(i) directs the supplier to terminate the agreement on the expiry date; or 45

ii) agrees to a renewal of the agreement for a further fixed term.

[13] Due to the respondents failure to vacate the property on the said date, the agent on 11 January 2021 caused a letter confirming the cancellation of the lease agreement which was delivered to the respondents. The respondents were afforded a further indulgence until 31 January 2021 to vacate the property.

[14] On 25 January 2021 the respondents attorney of record indicated that the respondents do not intent to vacate the property but intended to remain on the property “*until their building project is completed*”. It was further alleged by the respondents] that there existed an “*agreement via the agent*” to remain in occupation of the property until their building project had been completed.

[15] According to the agent prior to the respondents taking occupation of the property they had a discussion in that there would be a possibility of either early cancelation or renewing the lease agreement for a further defined period. The agent informed the respondents that the issue of renewal can only be decided upon not more than 80 (eighty) days, but not less than 40 (forty) days, before the end date of the lease agreement.

[16] The respondents refuse to vacate the property in terms of the letter dated 11 January 2021 and remained in occupation of the property until 30 September 2021.

[17] The respondents version entails that they indeed concluded the lease agreement as referred to above, however they contended that prior to the signing of the lease agreement they had a discussion with Donald and advised him that they were engaged in the construction of a newly built residence about 700 metre from the property which enables the second respondent to supervise the project on a daily basis.

[18] It was further contended by the respondents that due to uncertainties and delays in the construction industry they specifically require a lease with the option to extend the lease for a determinable period in event that the building project is not finalized by the

end of December 2020. The ability to vary the period of the lease agreement was crucial to the conclusion of the lease agreement.

[19] According to the respondents Donald in no uncertain terms agreed and accepted that the respondents may extend the lease agreement if the construction of their residence was not concluded by end of December 2020. On that basis the lease agreement was concluded.

[20] The respondents therefore remained in occupation of the property in terms of the lease agreement which was renewed on the basis as stated above. In terms of the “renewed” lease agreement the respondent legally remained on the property and vacated the property on 30 September 2021 as per the agreed terms of the “renewed” lease agreement, on the day that the construction of their residence was completed.

[21] On this basis the respondent argued that there was no need for the applicants to institute legal proceedings for ejectment, and the applicants have to pay the cost of the application on a party and party scale.

Submissions by the applicant

[22] Counsel for the applicant contended that the intention of the written fixed term lease agreement and interpretation of the ordinary meaning clauses contained, should not and cannot be altered by the mere *ipse dixit* of the respondent. It was further alluded that the interpretation and alleged intention of the respondents is so far removed from reality. On the respondents own version it was agreed that the lease agreement must be interpreted in accordance with the ordinary meaning of the words, and in such a manner as to validate and align such clauses with the South African Law as it stands.

[23] It was further argued by the applicants that the reason for opposing the application of ejectment was merely to delay the legal process until such time as it becomes convenient for the respondents to vacate the property, and the applicants were forced to

incur extraordinary legal costs, which they would not have incurred had the respondents adhered to the terms of the lease agreement.

[24] Counsel for the applicants submitted that at all relevant times there has been a clear intention for the application, and the foundation thereof is the written fixed term lease agreement concluded between the parties in January 2020. The argument was that the fixed lease agreement is a complete and true reflection of the intention of the parties.

[25] In particular, the intention of the parties was to enter into a fixed term lease agreement commencing on 11 January 2020 and terminating on 31 December 2020, with the *possibility/potential* to renew the lease agreement in future. The terms of the fixed lease agreement does not state that the respondents have an automatic entitlement to the renewal there off.

[26] It was submitted by the applicants that if the interpretation of the fixed term lease agreement and a non-existent “*renewal* “ by the respondents were to be accepted, the result will be that floodgates will be opened for landlords to be statutory compelled to continue with fixed term contracts beyond the expiry date and that may result in increased hesitancy to enter into contracts of this nature.

[27] It was argued that the respondents have opposed the application with the full knowledge that they do not have a valid defence and have done so purely with the *mala fide* intention to delay the proceedings until such time that their construction project was completed.

[28] Therefore the applicants submitted that the court should order the respondents to pay the costs of suit on an attorney and client scale. The issue of costs in any event is included in the lease agreement in clause 35, namely attorney and client scale.

Submissions by the respondent

[29] The respondents argued that the applicants application is without merit and that the respondents is deserving of a cost order.

[30] The respondents basis for the above is based on the fact that prior to the conclusion of the lease agreement Donald was made aware of the fact that the renewal of the lease agreement beyond the twelve month period was crucial to the conclusion there off. The respondents indicated to Donald that the construction of their residence *may* take longer than expected and the lease agreement could be renewed. Donald indicated to them that the renewal was to be discussed towards the end of the fixed term period and *would not be an issue*. On this basis the lease agreement was concluded.

[31] Counsel for the respondents argued that in terms of clause 10 read with clause 6.1 of the lease agreement the amount of monthly rental which the tenant is paying shall automatically increase annually at 10% on each anniversary of the commencement date of the lease unless otherwise negotiated and agreed upon by the landlord and must be reduced in writing. Furthermore after the initial fixed term of the lease, the lease will automatically continue on a month to month basis unless the tenant expressly directs the landlord in writing to terminate the lease on the expiry date or agrees to a renewal of the lease for a further term.

[32] It was argued by the respondents that the lease agreement makes specifically provision in terms of section 25 for the renewal of the lease period. The fact that the lease agreement makes provision for a 10% escalation beyond 31 December 2020 must be interpreted that the lease agreement contemplates an extension, and the only issue to be negotiated was the period on renewal.

[33] The respondents disagreed with the argument by the applicant in that the lease agreement should be interpreted with the ordinary meaning of the words. They argued that in the interpretation of the lease agreement the circumstances under which the lease

agreement were concluded must also be taken into consideration, which entails the discussion with Donald, the agent regarding the extension of the lease agreement.

[34] The respondents argued that they would not have entered into the lease agreement if they were not permitted to extend the lease agreement in the event of their construction not being completed. This would have caused great inconvenience as the respondents would be required to relocate from the property into another property only to once again have to relocate into the new constructed residence. Counsel for the respondents contended that it is improbable that a person would have agreed to do so.

[35] It was stated that all the respondents required was an extension of the lease period for eight (8) months, not as argued by the applicants for an indefinite period. The respondents vacated the property on 30 September 21, which is in accordance with the extension requested.

[36] It was further argued that there was a dispute of facts when evaluating the terms of the lease agreement, they submitted that even though the applicant were fully aware of the dispute in facts, they elected to proceed by way of application. For this reason namely a material dispute of fact being present in the matter the application is to be dismissed.

[37] The respondent was of the view that seeking a cost order in the circumstances set out in their arguments is inappropriate. The reasons are that the applicants was aware of the agreement the respondent had with Donald, and therefore should not have proceeded with the application. Counsel for respondents argued that when evaluating all facts they had a good chance of success and therefore is entitled to a cost order.

Case law and evaluation -Costs

[38] The basic principles governing granting of cost ordered in civil litigation is that the judicial officer has the discretion in granting same, but that costs should generally follow the result.⁴

[39] The most important principle is that where a party has been substantially successful in bring or defending a claim, that party is generally entitled to have a cost order made in favour against the other party who was not successful.

[40] In order to establish who is to be regarded as the successful party, the court must look at the substance of the judgment and not merely its form.⁵ In this regard the court will need to establish which of the parties had been substantially successful. As such the court should not, but for very good reason deprive a party of his costs, in whole or in part.

[41] Furthermore, in handing down its order and exercising its discretion the court shall also take into account the conduct of the parties and their legal representatives during the proceedings. In certain instances, there are however exceptions to the above principles, these circumstances are unique to each case and accordingly remain within the discretion of the presiding officer.

[42] An exception that a court may apply in determining whether or not costs should be awarded are firstly, that a successful party may be deprived of costs if there is good reason for that, and secondly a party who unnecessary causes costs must bear those costs.

[43] In the matter before me the application for ejectment became *moot* as a result of the respondents moving out of the property on 30 September 2021. The only issue to be decided upon is the issue of costs.

⁴ See The Law of Costs (2006) by A Cilliers at paragraph 14.04.

⁵ Skotnes v SA Library 1997 (2) SA 770 (SCA)

[44] In consideration of the cost order, one needs to review the terms of the fixed term lease agreement and the conduct of the respondents.

[45] It is not disputed by the parties that a fixed term lease agreement was concluded between them on 6 January 2020. The relevant terms of conditions of the lease agreement are the following;

1. In terms of clause 6 the monthly rental amount was R 11 950.00, the term of the lease was twelve (12) months and the commencement date was 11 January 2020 and the termination date was 31 December 2020.
2. Monthly rental payable by the respondents shall be subject to an annual escalation of 10% per annum.
3. The respondents will be contacted not more than 80 (Eighty) days, but not less than 40 (Forty) days, before the end date of the lease agreement, in respect of renewing the lease agreement. Any renewal of the lease agreement will be negotiated between and agreed to by the applicants/agents and the respondents, which terms shall be reduced to writing.
4. Should the applicants have to take legal action against the respondents, the respondents shall pay costs on an attorney and client scale, such costs to include collection commission, VAT and tracing costs, or debt collector' fees and administration charges or any other collection or commission charges.

[46] I am of the view that the terms contained in the fixed term lease agreement concluded between the applicants and respondents are clear. The court in *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC*⁶ said that what the parties and their witnesses *ex post facto* think or believe regarding the meaning to be attached to the clauses of an agreement, and thus what their intention was, is of no assistance in the exercise of interpretation of written agreements.

⁶ [2015] ZASCA 62.

[47] In the judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁷ Wallis JA said the following with regard to the construction of a document;

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production”

[48] In the matter of *Worman v Hughes and Others*⁸ was expressed as follows;

“It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means...”

[49] The argument of the respondents is that they acted in accordance with the lease agreement has to fail for the following reasons;

1. The lease agreement clearly states that the term of lease is a fixed term for a period of twelve (12) months, which term commences on 11 January 2020 and terminates on 31 December 2020.
2. The fact that the possibility of a renewal of the contract was discussed with “Donald” does not cancel the fixed term clause of the lease agreement.
3. The argument that the discussion with Donald read with the terms of the lease agreement entitles the respondents to remain on the property does not hold water. During the discussion with Donald the respondents not only indicated that they **may** need to renew the lease agreement beyond the fixed term, but they also indicated that in event of the construction of their residence concludes earlier,

⁷ 2012 (4) SA 593 at paragraph [18].

⁸ 1948 (3) SA 495 (A) at page 505.

they will have to cancel the lease agreement. Evident from the above are the following;

- i. There was the possibility of cancelling the lease contract prior to the termination of the fixed term of twelve (12) months,
- ii. There was the possibility that the fixed term lease agreement will be extended beyond the twelve (12) months fixed term, and
- iii. If the arguments of the respondents are to be accepted, there was no indication of the term of extension in event the lease agreement was to be extended. The term of the lease agreement will therefore have been indefinite, which is highly unlikely when looking at this from the perspective of the applicants.

[50] There is no doubt that the lease agreement was concluded for a fixed term of twelve (12) months and therefore following the notice of non-renewal send to the respondents by the applicant the respondents were legally obliged to vacate the property on 31 December 2021. The language of the provisions contained in the lease agreement does not support the arguments of the respondents.

[51] The respondents remained in occupation of the property until 30 September 2021. The occupation from 1 January 2021 until 30 September 2021 was in contravention of the lease agreement and therefore unlawful. The applicants were entitled to approach the court for the relief sought and if the application proceeded the applicants would have been successful. On this basis alone I am of the view that the applicants are entitled to an order of costs.

[52] Furthermore the conduct of the respondents in the matter is deserving of a punitive cost order. Due to their failure to abide by the terms of the lease agreement and their failure to vacate the property as requested on 31 December 2021 the applicants had to issue Notice of Motion on 19 March 2021. Six months later, two weeks prior to the applications being heard the respondents vacated the property. The delay in the matter was purely to obtain the result which was to remain unlawful on the property for a

period. Therefore the respondents caused the proceedings to be instituted. The respondents are held fully accountable for these proceedings, which have arisen purely as a consequence of their disregard to the terms of the fixed term lease agreement.

[53] Be that as it may, the fixed lease agreement in clause 35 states that should the applicants have to take legal action against the respondents, the respondents shall pay the costs on an attorney and client scale. The applicants decision to launch legal proceedings was justified in the circumstances.

Order

[54] In the premises I make the following order:

Costs to be paid by the first and second respondents on an attorney and client scale jointly and severally the one paying the other to be absolved.



**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

Date of hearing: 04 October 2021

Date of judgment: 27 October 2021

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